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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCO ANTONIO ALDERETE,

Defendant and Appellant.

F075445

(Super. Ct. No. VCF277041)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Kathryn T. Montejano, Judge.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Tia M. Coronado and Daniel B. Bernstein, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant was convicted of attempted murder and assault with a deadly weapon arising from an incident where he repeatedly struck his roommate at a recovery center with a baseball bat while the victim was laying in bed. Appellant contends the judgment of his convictions must be reversed because the trial court erred by failing to instruct the jury on the defense of unconsciousness. In the alternative, he contends his attempted murder conviction must be reversed for a new trial or reduced to voluntary manslaughter because the trial court erred by withdrawing its instruction to the jury on voluntary manslaughter—imperfect self-defense. In supplemental briefing, appellant contends the matter must be remanded to allow the trial court to exercise its discretion whether to strike his prior serious felony enhancement pursuant to Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Senate Bill 1393) and for the trial court to hold a hearing on his ability to pay fees, assessments, and the restitution fine pursuant to the recent decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We agree the matter should be remanded for the limited purpose of permitting the trial court to exercise its new discretion under Senate Bill 1393. In all other respects, the judgment is affirmed.

PROCEDURAL BACKGROUND

Appellant was charged by information with attempted murder with premeditation and deliberation (Pen. Code, §§ 664/187, subd. (a);[1] count 1) and assault with a deadly weapon (§ 245, subd. (a)(1); count 2). As to count 1, it was alleged appellant personally used a deadly weapon in the commission of the offense (§ 12022, subd. (b)(1)). As to both counts, it was alleged appellant personally inflected great bodily injury on the victim (§ 12022.7, subd. (a)). As to each count, it was further alleged that appellant had suffered three prior strike felonies (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), a prior serious

[1] All further undesignated statutory references are to the Penal Code, unless otherwise indicated.

felony (§ 667, subd. (a)(1)), and two prior prison convictions (§ 667.5, subd. (b)). Appellant pleaded not guilty by reason of insanity.

A jury convicted appellant of both counts. The jury could not come to a decision on the premeditation and deliberation allegation but found all other conduct enhancements true. The prosecution later dismissed the premeditation and deliberation allegations.

Following a sanity trial by jury, appellant was found to be sane at the time he committed the offenses.

In a bifurcated bench trial, the court found appellant had suffered two prior strike felonies, a prior serious felony, and two prior prison convictions.

As to count 1, the court sentenced appellant to 27 years to life plus three years for the section 12022.7 enhancement, one year for the section 12022.1 enhancement,[2] and five years for the section 667, subdivision (a)(1) enhancement. The court stayed sentence as to count 2 pursuant to section 654. Appellant's total sentence was 27 years to life plus a determinate term of nine years. He was ordered to pay a restitution fine in the amount of $10,000 pursuant to section 1202.4, a court operations assessment in the amount of $80, and a criminal conviction assessment in the amount of $60.

FACTS

Guilt Phase

Prosecution Case

On December 22, 2012, at approximately 6:15 a.m., the police were dispatched to a recovery center regarding an assault. When the police arrived, they were directed to a bedroom upstairs and observed appellant being held down by several people. Witnesses

[2] As we explain in section V of this opinion, this appears to have been a misstatement by the judge, and the abstract of judgment should be corrected to reflect a section 12022, subdivision (b)(1) enhancement.

informed the police that appellant had been striking another resident, Phillip H.,[3] with an aluminum baseball bat.

As of the night of the incident, Phillip had resided at the recovery center for approximately three days. Phillip slept in a room of about six beds. Appellant slept two beds over from Phillip. Phillip had seen appellant at group meetings and had never had a fight or confrontation with him. Their communication amounted to small talk once or twice. On the night of the incident, there was a late group meeting that ended around 11:30 p.m. The residents all went to bed after the meeting.

Phillip woke up to being hit with a baseball bat by appellant. Appellant hit Phillip with the bat in his legs, the bottom of his feet, his arm, and his head. Appellant was bringing the bat all the way back while he was delivering the blows. Phillip estimated that appellant hit Phillip with the bat 20 to 25 times for approximately two to three minutes. Phillip yelled for help, and other residents came to help get appellant away from Phillip. Phillip had contusions on his legs and needed approximately 11 to 12 stitches in his head and stitches in his legs as well. Phillip felt pain for almost two months and was in a wheelchair for a month because he could not put weight on the bottom of his foot. Phillip said that no bats were kept in his room, and he did not see a bat in his room before he went to bed.

Another resident at the recovery center, house manager Jesse Shields, testified he was responsible for deciding who did chores around the center and making sure "things are run smoothly." Shields testified that appellant had been at the center for a few weeks and had chores around the center. Shields stated he was able to communicate with appellant; however, appellant "wasn't completely there" and talked to himself. Shields saw appellant petting an imaginary cat once. On the night of the incident, Shields awoke

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[3] We refer to the victim by his first name to respect his privacy. No disrespect is intended.

to a clinging sound and yelling. He ran towards the sound to Phillip and appellant's room and saw a crowd standing around watching appellant hitting Phillip repeatedly with the bat. Shields said Phillip was "stuck" in the corner of the room where his bed was located. Shields saw Phillip was on his back and was trying to block the hits. Shields said appellant had the bat clutched with both hands and was swinging the bat like he was chopping wood. Shields pulled appellant away from Phillip and held him down until the police came. Shields testified the baseball bats are kept in a box in the courtyard outside the center; none were kept inside.

Approximately a half an hour to an hour after appellant's arrest, appellant was interviewed by police. A recording of the interview was played for the jury. In his interview, appellant told officers that the way Phillip was moving his hands under the sheets made appellant think Phillip had a gun. Appellant did not feel safe, and that is why he went after Phillip.

Appellant told the officers that after he saw Phillip's hands move under the sheets, he went outside to get the baseball bat. Appellant said he thought Phillip was going to kill him. When asked why he went inside if he thought Phillip was going to kill him, appellant responded, "Because I have to live there."

One of the officers asked appellant why appellant did not leave the room and call the police, and the following colloquy occurred:

"[APPELLANT]: Because I don't have a phone.

"[OFFICER]: The house does. That's where it called us. If you think this guy's got a gun, why would you leave the room, go downstairs and then come right back into that room?

"[APPELLANT]: Because I thought he was going to hurt me. I thought he was going to kill me.

"[OFFICER]: You're walking out, brother. You're away from the threat. You're away from the threat. You go and get this bat from outside, I'm assuming in a garage area that's outside—

"[APPELLANT]: I didn't feel safe there.

"[OFFICER]: —on the first floor, outside, across the courtyard, grabbed the bat, walked back across the courtyard, back inside the residence, up the stairs, turn left in the hallway, go back into the room, walk up to his bed and start striking him repeatedly. That's not the actions of somebody's who's afraid.

"[APPELLANT]: No.

"[OFFICER]: Okay? Not at all. And actions of somebody who's afraid is, once they leave, they don't go back in there. Do you agree with me?

"[APPELLANT]: Yes.

"[OFFICER]: Yeah. So it doesn't sound like you were afraid at all, brother. It sounds like you were going to take care of business. Correct? You're shaking your head yes.

"[APPELLANT]: Yeah."

When the officer conducting the interview asked appellant if he hoped Phillip died, appellant said, "Yeah." Appellant never saw Phillip with a gun.

Appellant also told the officers he (appellant) was "letting out some anger" because of his "nieces and nephews dying." During the interview, appellant made several comments regarding his nieces and nephews dying. Appellant then told the officers his nieces and nephews died "[o]ut in the country" a "couple days ago." When asked who told appellant his nieces and nephews died, appellant replied, "It's a premonition."

Defense Case

Dr. Geshuri, a psychologist, testified on behalf of the defense. Dr. Geshuri testified he performed a three-hour assessment in December 2015 of appellant's state of mind at the time of the commission of the offense. Dr. Geshuri administered several tests involving intellectual functioning, cognitive functioning, and neurological screening. Dr. Geshuri also administered psychological tests to determine whether appellant was malingering, or lying, on any particular test. Dr. Geshuri determined appellant was being honest during testing. Dr. Geshuri testified appellant had a history of mental illness.

Dr. Geshuri testified he concluded that appellant was mentally ill and had a severe psychiatric disorder, with symptoms consistent with schizophrenia at the time of the offense. Dr. Geshuri opined that appellant suffered from delusions, command performance hallucinations, and mania at the time of the commission of the offense.

Dr. Geshuri testified that delusions can be "real-life stories" that the person makes up in his head. Command performance hallucinations are when voices inside a person's head tells him to do something. Mania is when a person has a very elevated mood. Dr. Geshuri also testified appellant was sleep deprived at the time of the offense, which further clouded clear thinking.

Rebuttal Case

The People called psychologist Dr. Bindler as a rebuttal witness. Dr. Bindler testified that he prepared an evaluation of appellant in May 2015. Dr. Bindler conducted a clinical interview with appellant to determine whether he was able to understand the charges. Dr. Bindler noted that appellant spoke in a coherent manner and did not seem disorganized. At the time of Dr. Bindler's evaluation, he diagnosed appellant with major depressive disorder with psychotic features based on appellant's history of hallucinations. A person with major depressive disorder with psychotic features can experience hallucinations or delusions during a period of severe depression.

DISCUSSION

I. Unconsciousness Instruction

"Unconsciousness, if not induced by voluntary intoxication, is a complete defense to a criminal charge." (*People v. Halvorsen* (2007) 42 Cal.4th 379, 416–419 (*Halvorsen*).) Someone is "unconscious" when he or she is not conscious of his or her actions. (*People v. Newton* (1970) 8 Cal.App.3d 359, 376.) "To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist 'where the subject physically acts but is not, at the time, conscious of acting.' " (*Halvorsen*, at pp. 416–419.) Unconsciousness may be induced by an "unsound mind." (*People v. James* (2015) 238 Cal.App.4th 794, 809.)

A trial court must instruct on the unconsciousness defense on its own motion if it appears the defendant is relying on the defense, or if there is substantial evidence supporting the defense and the defense is not inconsistent with the defendant's theory of the case. (*People v. Rogers* (2006) 39 Cal.4th 826, 887.) Substantial evidence means evidence of a defense, which, if believed, would be sufficient for a reasonable jury to find a reasonable doubt as to the defendant's guilt. (*People v. Salas* (2006) 37 Cal.4th 967, 982–983.)

Appellant contends the court erred by failing to instruct the jury sua sponte on the unconsciousness defense. We disagree. There is no evidence on the record that appellant was unconscious during the time of the offense. This case is analogous to *Halvorsen*. In *Halvorsen*, the appellate court reviewed the trial court's refusal to give an unconsciousness instruction where the defendant suffered from bipolar disorder exacerbated by intoxication. (*Halvorsen*, *supra*, 42 Cal.4th at p. 417.) The court concluded that the defendant's testimony made clear he did not lack awareness of his actions during the course of his offenses. (*Id*. at p. 418.) The defendant in *Halvorsen* testified in "sharp detail" regarding the crimes with which he was charged. (*Ibid*.) Here, we conclude that appellant's statement to law enforcement regarding the events suggest

he was aware of his actions at the time of the offense. Appellant made no statement that would suggest he did not remember what happened. Rather, he explained what he did and gave reasons for doing so.

In support for his argument, appellant refers us to Shields's testimony that he saw appellant petting a nonexistent cat once and Dr. Geshuri's testimony that hallucinations could make appellant "unaware of his surroundings." This evidence is not persuasive as to appellant's consciousness at the time of the incident, as appellant was able to recount what happened upon his arrest. Appellant's ability to recollect what happened negates any possible inference he was not conscious at the time.

Appellant also argues his trial counsel actually relied on the defense during his closing argument by making such comments as appellant "was out of his mind," " 'in a high state of … mental incapacity,' " and did not "even know what's going on" (emphasis omitted). We do not agree these statements are specific enough to alert the trial court that trial counsel was intending to imply that appellant was "unconscious." Even if we were to construe them as appellant does, such comments are, as we have discussed, unsupported by the record.

Because appellant presented no substantial evidence he was unconscious when he committed the offenses, the trial court did not err by not instructing the jury sua sponte on the unconsciousness defense.

II. Imperfect Self-Defense Instruction

The trial court has a sua sponte duty to instruct the jury on a lesser included offense where "substantial evidence" is adduced at trial to support the lesser charge. (*People v. Stitely* (2005) 35 Cal.4th 514, 551.) Voluntary manslaughter is a lesser included offense of murder when the requisite mental element of malice is negated by an unreasonable but good faith belief in the necessity of self-defense. (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 708.) This is commonly known as "imperfect self-defense." The California Supreme Court in *People v. Elmore* (2014) 59 Cal.4th 121 (*Elmore*),

however, held that purely delusional acts are excluded from the scope of imperfect self-defense. (*Id.* at p. 136.) The high court explained:

> "A defendant who makes a factual mistake misperceives the objective circumstances. A delusional defendant holds a belief that is divorced from the circumstances. The line between mere misperception and delusion is drawn at the absence of an objective correlate. A person who sees a stick and thinks it is a snake is mistaken, but that misinterpretation is not delusional. One who sees a snake where there is nothing snakelike, however, is deluded. Unreasonable self-defense was never intended to encompass reactions to threats that exist only in the defendant's mind." (*Elmore, supra,* 59 Cal.4th at pp. 136–137.)

Here, in a motion in limine, the prosecutor asserted appellant was not entitled to an instruction for attempted voluntary manslaughter. The prosecutor cited *Elmore*'s proposition that imperfect self-defense alone cannot be based on delusion to support his assertion. The court agreed that *Elmore* stood for the proposition and stated the issue would have to be dealt with later in the proceedings.

After the close of evidence, the court orally instructed the jury on imperfect self-defense. The following day, before closing arguments were to begin, the court told counsel outside the presence of the jury that it gave the instruction by mistake. The court told counsel it intended to tell the jury to disregard the instruction. Counsel stipulated that the instruction should not have been given. No objection was made by defense counsel. The court noted its decision was predicated on the court's previous ruling on the in limine motion and no objection to the propositions of *Elmore* and *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437 (an opinion by this court standing for the same proposition, expressly approved by the high court in *Elmore*). The court subsequently instructed the jury to disregard the instruction because it does not pertain to the case and ordered the jury to not consider the instruction for any reason.

Appellant contends the trial court erred by recanting the instruction because his belief that Phillip had a gun had an objective correlate—the movement of Phillip's hands

under the blanket—and thus was not wholly based on delusion, entitling him to the defense.

We need not resolve the issue of whether appellant's thought that Phillip had a gun under the sheets was based on delusion. The imperfect self-defense doctrine "requires without exception that the defendant must have had an *actual* belief in the need for self-defense. [The California Supreme Court has] emphasize[d] what should be obvious. Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury. ' "[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with.*" … [¶] This definition of imminence reflects the great value our society places on human life.' [Citation.] Put simply, the trier of fact must find an *actual* fear of an *imminent* harm. Without this finding, imperfect self-defense is no defense." (*In re Christian S.* (1994) 7 Cal.4th 768, 783.)

Here, the record clearly shows appellant did not have an actual belief (whether reasonable or unreasonable, based on delusion or not) that he was in *imminent* danger. The facts are uncontroverted that appellant left the room where Phillip was to obtain a baseball bat. The baseball bats were kept downstairs and outside in a courtyard. Thus, appellant fled the perceived danger and consciously went back with a weapon to commit the offense. Appellant clearly did not fear *imminent* danger or take *immediate* action. Thus, substantial evidence did not support the giving of the instruction.

III. Senate Bill 1393

Appellant contends we must remand his case to the trial court for resentencing in light of Senate Bill 1393. Senate Bill 1393 went into effect January 1, 2019, and amended sections 667 and 1385 to eliminate the statutory prohibition on a trial court's ability to strike a five-year enhancement imposed pursuant to section 667, subdivision (a)(1). (Stats. 2018, ch. 1013, §§ 1, 2.) Respondent concedes these laws apply

retroactively to appellant's case, and that a remand for resentencing is appropriate. We accept respondent's concession without further analysis.

IV. Ability to Pay Fines and Fees

Appellant argues his case must be remanded for a hearing to determine his ability to pay an $80 court security fee (§ 1465.8), a $60 criminal conviction assessment (Gov. Code, § 70373), and a $10,000 restitution fine (§ 1202.4, subd. (b)) relying on the recent decision in *Dueñas*, *supra*, 30 Cal.App.5th at pages 1163–1173. Division Seven of the Second Appellate District held in *Dueñas* that the imposition of the court security fee and the criminal conviction assessment without a determination of the defendant's ability to pay them violates the constitutional guarantee of due process. The *Dueñas* court also held that if the defendant has demonstrated an inability to pay the restitution fine, the trial court must stay execution of the fine until the People prove the defendant has gained the ability to pay.

Since appellant's case is being remanded for the court to exercise its discretion regarding the prior enhancement, we need not and do not address his contention regarding ability to pay. On remand, if he so chooses, appellant may request a hearing on his ability to pay the fines, fees, and assessments. At such a hearing, appellant would bear the burden of proving his inability to pay: "[A] defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court." (*People v. Castellano* (2019) 33 Cal.App.5th 485, 490.)

V. Abstract of Judgment Correction

Respondent points out the abstract of judgment incorrectly shows in section 2 a one-year enhancement was imposed pursuant to section 12022.1 and should be corrected to reflect the enhancement was imposed pursuant to section 12022, subdivision (b)(1). We agree. We may correct a clerical error at any time. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Clerical errors include "inadvertent errors made by the court 'which

cannot reasonably be attributed to the exercise of judicial consideration or discretion.' " (*Conservatorship of Tobias* (1989) 208 Cal.App.3d 1031, 1034.)

Here, according to the reporter's transcript, the court did in fact order the enhancement pursuant to section 12022.1. This was clearly an inadvertent misstatement because it was section 12022, subdivision (b)(1), not section 12022.1, that was alleged by the People and found true by the jury. This misstatement cannot be reasonably attributable to the exercise of judicial discretion.

DISPOSITION

The matter is remanded to the trial court to exercise its discretion whether to strike the prior serious felony enhancement, and, if the enhancement is stricken, to resentence appellant.

The trial court is directed to amend the abstract of judgment by correcting the "PC 12022.1" enhancement in section 2 to reflect "PC 12022(b)(1)." A certified copy of the amended abstract of judgment shall be forwarded to the appropriate authorities.

In all other respects, the judgment is affirmed.

_____
DE SANTOS, J.

WE CONCUR:

_____
DETJEN, Acting P.J.

_____
SNAUFFER, J.